80-1884

Office-Supreme Court, U.S.
FILED
MAY 6 1981
ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

MEMOREX CORPORATION, et al.,

Petitioners,

vs.

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOHN L. ENDICOTT
PAUL G. BOWER
515 South Flower Street
Los Angeles, California 90071
(213)-488-7000
Attorneys for Petitioners

Of Counsel:

GIBSON, DUNN & CRUTCHER
RONALD S. BEARD
2029 Century Park East
Los Angeles, California 90067

LIMBACH, LIMBACH & SUTTON
KARL A. LIMBACH
2001 Ferry Building
San Francisco, California 94111

(Appendix to the Petition is in a separate volume)

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QUESTIONS PRESENTED

Is a course of conduct of a monopolist that was conceived and executed with the purpose and effect of excluding competitors from relevant markets immunized from liability under Section 2 of the Sherman Act because part of the conduct consisted of price cuts projected by the monopolist to be above its marginal or average variable cost? Should the proper standard for assessing the legality of a monopolist's conduct that includes price cuts be based upon such a cost-based *per se* test, or a rule of reason approach that considers all relevant factors, including the intent of the monopolist, the nature of other conduct in addition to price cuts, and the actual effect on competition?[1]

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[1] The parties to this proceeding are petitioners Memorex Corporation, Memorex Sales and Service Corporation and ILC Peripherals Leasing Corporation (hereinafter referred to collectively as "Memorex"), and respondent International Business Machines Corporation. The only subsidiaries of Memorex Corporation which are not wholly-owned are Memorex DIC Corporation, Memorex Finance Company, Memorex Japan, Ltd., Telex Computers S.A., and Memorex Ribbon Corporation. The only affiliate of Memorex Corporation is Teijin Memorex, Ltd.

TABLE OF CONTENTS

PAGE

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

A. Industry and Market Background 2

B. Parties Involved 3

C. IBM Studied And Systematically Attacked Memorex And Other PCMs At The Point Of Entry With A Series Of Interrelated Acts Involving Predatory Pricing, Arbitrary Product Manipulations And Exclusionary Marketing Practices; All With The Intent And Effect Of Foreclosing Competition 5

1. IBM was unable to respond competitively with improved products, and instead acted to exclude the PCMs before they could surmount the barriers to entry. 5

2. As an integral part of its exclusionary course of conduct IBM identified its target competitors and studied them in detail 6

3. IBM acted quickly and intentionally to foreclose new competition at the point of entry 8

4. The effect of the course of conduct was virtual elimination of the PCMs 10

D. Proceedings Below 11

1. Petitioner's complaint 11

2. Proceedings in the District Court 11

3. Proceedings in the Ninth Circuit 12

REASONS FOR GRANTING THE WRIT 13

PAGE

A. The Decisions Below And *CalComp* Are In Direct Conflict With Decisions Of This Court, Are Contrary To The Goals Of The Sherman Act, And Cannot Be Supported On The Claimed Goal of Economic Efficiency 13

1. The Courts below totally ignored the "willful" standard of monopolization established in leading cases of this Court 13

2. The *CalComp/Memorex* decisions totally disregard evidence of defendant's intent and are thus in direct conflict with a number of decisions of this Court stressing the importance of intent in assessing antitrust violations 15

3. The *CalComp/Memorex* decisions sacrifice intent and the willfulness test to mechanistic *per se* pricing rules 18

4. The cost-based *per se* rules of *CalComp/Memorex* sacrifice the broader goals of the Sherman Act for purported economic efficiency 20

5. The *per se* tests adopted by *CalComp/Memorex* cannot be supported on grounds of efficiency and result in virtual immunity for a monopolist 22

6. The practical effect of the cost-based rules has been to deprive plaintiffs of their right to jury trial 26

B. There Is Conflict Between The Circuits As To The Proper Test for Monopolization 27

C. This Court Should Act Now To Settle An Important And Timely Issue Of Federal Law With Far-Reaching Consequences 28

CONCLUSION 30

TABLE OF AUTHORITIES

CASES — PAGE

American Tobacco Co. v. United States, 328 U.S. 781 (1946) ...14, 21
Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933) 16
Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2nd Cir. 1979), cert. denied, 444 U.S. 1093 (1980) 9
Borden Inc. (1976-1979 Transfer Binder) Trade Reg. Rep. (CCH ¶ 21490 (1979) 27
Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979) 19
Brown Shoe Co. v. United States, 370 U.S. 294 (1962) 21
California Computer Products, Inc. v. International Business Machines Corp., 613 F.2d 727 (9th Cir. 1979) .....*passim*
Chillicothe Sand & Gravel Co. v. Martin Marietta Corp., 615 F.2d 427 (7th Cir. 1980) 27
City of Morgantown, W.Va. v. Royal Inns Co., 337 U.S. 254 (1949) 26
Continental Ore. v. Union Carbide, 370 U.S. 690 (1962) 12
Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) 19
Dimick v. Schiedt, 293 U.S. 474 (1935) 26
FTC v. Anheuser-Busch, Inc., 363 U.S. 536 (1960) 16
Greyhound Computer Corporation, Inc. v. IBM, 559 F.2d 488 (9th Cir. 1977) 24
Hanson v. Shell Oil Co., 541 F.2d 1352 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977) 13, 20, 27
I. E. du Pont Nemours & Co. 3 CCH Trade Reg. Rep. ¶ 21 pp. 29170-983 (1980) 27
ILC Peripherals Leasing Corp. v. IBM, 448 F.Supp. 228 N.D. Cal. 1978) 11
In Re U.S. Financial Securities Litigation, 609 F.2d 411 (9th Cir. 1979) 26
International Air Industries v. American Excelsior Co., 517 F.2d 714 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976) 27
International Boxing Club of New York, Inc. v. United States, 358 U.S. 242 (1959) 14

CASES — PAGE

Jacob v. City of New York, 315 U.S. 752 (1942) 26

Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978) 13, 20, 27

National Society of Professional Engineers v. United States, 435 U.S. 679 (1978) 19

Northeastern Tel. Co. v. American Tel. & Tel. Co., 497 F. Supp. 230 (D. Conn. 1980) 27

O. Hornusel Co. v. Ferro Corp., 472 F. Supp. 793 (W.D. Pa. 1979) 27

Pacific Engineering & Production Co. of Nevada v. Kerr-McGee Corp., 551 F.2d 790 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977) 27

Poller v. Columbia Broadcasting, 368 U.S. 464 (1962) 16

Richter Concrete Corp. v. Hilltop Basic Resources, Inc., 1981-1 Trade Cas. ¶ 63,947 (S.D. Ohio 1981) 27

Schine Chain Theatres v. United States, 334 U.S. 110 (1948)..... 18

Standard Oil Co. v. United States, 221 U.S. 1 (1911).....14, 21

Swift & Co. v. United States, 196 U.S. 375 (1905) 12

Telex Corp. v. IBM Corp., 510 F.2d 894 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975) 27

Transamerica Computer Co., Inc. v. International Business Machines Corp., 481 F. Supp. 965 (N.D. Cal. 1979) 15, 27, 28

United States v. Aluminum Company of America, 148 F.2d 416 (2d Cir. 1946) 14, 15, 21, 28

United States v. American Tobacco Co., 221 U.S. 106 (1911)..... 14

United States v. Crescent Amusement Co., 323 U.S. 173 (1944) 14

United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377 (1956) 14

United States v. Griffith, 334 U.S. 100 (1948) 14

United States v. Grinnell Corporation, 384 U.S. 563 (1966) 14, 16

CASES — PAGE

United States v. International Harvester Co., 274 U.S. 693 (1927) 14

United States v. Otter Tail Power Co., 410 U.S. 366 (1973) 14

United States v. Reading Co., 253 U.S. 26 (1920) 14

United States v. Terminal Railroad Association of St. Louis, 224 U.S. 383 (1912) 14

United States v. TransMissouri Freight Assn., 166 U.S. 290 (1897) 21

United States v. United Shoe Machinery Co., 347 U.S. 521 (1954) 14, 15

United States v. U.S. Gypsum Co., 333 U.S. 364 (1948) 14

United States v. United States Gypsum Co., 438 U.S. 422 (1978) ... 16

United States v. U.S. Steel Corporation, 241 U.S. 417 (1920) 14

United States v. Von's Grocery Co., 384 U.S. 270 (1966) 21

Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967) ... 16, 17

Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172 (1965) 14

Wever v. Wynne, 431 F. Supp. 1048 (D.N.J. 1977) 27

STATUTES AND RULES

Clayton Act, Section 3 11

Clayton Act, Section 4 (15 U.S.C. § 15) 2

Sherman Act, Section 2 (15 U.S.C. § 2) 2, 11

MISCELLANEOUS

A.D. Neale, *The Antitrust Laws of the U.S.A.*, pp. 427-32 (Cambridge University Press 1970) 21

Areeda and Turner, *Antitrust Law* (1978) ¶ 715, n.7 18

Areeda and Turner, *Predatory Pricing: A Rejoinder*, 88 Yale L.J. 1641 (1979) 23

MISCELLANEOUS PAGE

Areeda and Turner, *Predatory Pricing and Related Practices under Section 2 of the Sherman Act,* 88 Harv. L. Rev. 697 (1975) 13, 18

Areeda and Turner, *Scherer on Predatory Pricing: A Reply,* 89 Harv. L. Rev. 891 (1976) 23

Areeda and Turner, *Williamson On Predatory Pricing,* 87 Yale L.J. 1337 (1978) 23

Bartkus, *Innovation Competition: Beyond Telex v. IBM,* Note, 28 Stan. L. Rev. 285 (1976) 23

Baumol, *Quasi Permanence of Price Reductions: A Policy for Prevention of Predatory Pricing,* 89 Yale L.J. 1 (1979) 23

Beckenstein and Gable, *Predation Rules: An Economic and Behavioral Analysis,* The Colgate Darden Graduate School of Business Administration, University of Virginia, December 1979 23

Berk, *The Antitrust Paradox,* 154 (1978) 24

Brock, *Price and Product Actions—Partial Systems,* The U.S. Computer Industry, a Study of Market Power, p. 109, Ballinger Publishing Company 23

Commentary, An Appraisal of Marginal Cost and Predatory Pricing Under Section 2 of the Sherman Act, 30 Ala. L. Rev. 562 (1979) 23

Elzinga, *Predatory Pricing: The Case of the Gunpowder Trust,* 13 Jour. Law and Econ. 223 (1970) 23

Geer, *A Critique of Areeda and Turner's Standard for Predatory Practices,* 24 Antitrust Bull. 233 (Summer 1979) 23

Koller, *On the Definition of Predatory Pricing,* 20 Antitrust Bull. 329 (Summer 1975) 24

Koller, *The Myth of Predatory Pricing: An Empirical Study,* 4 Antitrust Law and Econ. Rev. 105 24

MISCELLANEOUS PAGE

Koller, *When is Pricing Predatory?*, 24 Antitrust Bull. 283 (Summer 1979) 24

Jordan, *Telex v. IBM:* Remodeling the Crisis in Antitrust, Note, 23 UCLA L. Rev. 737 (1976) 24

Joskow and Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 Yale L.J. 213 (1979) 23

McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 Jour. Law and Econ. 137 (1958) 24

National Commission for the Review of Antitrust Laws and Procedures, Report, Section 2, pp. 149-50, GPO ed. (1979) 17

Note, *Telex v. IBM, Monopoly Pricing Under Section 2 of the Sherman Act*, 84 Yale L.J. 558 (1975) 24

Posner, *Antitrust Law: An Economic Perspective*, University of Chicago Press (1976) 24

Posner, *The Chicago School of Antitrust Analysis*, 127 U. Pa. L. Rev. 925 (1979) 24

Potter, *Pacific Engineering & Production Co. v. Kerr-McGee Corp—Predatory Pricing Under Section 2 of the Sherman Act*, Note, 2 Utah L. Rev. 377 (1977) 24

Salop, *Strategic Entry Deterrance*, American Economic Association (May 1979) 24

Scherer, Book Review, *the Posnerian Harvest: Separating Wheat from Chaff*, 86 Yale L.J. 974 (1977) 24

Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 Harv. L. Rev. 868 (1976) 24

Scherer, *Some Last Words on Predatory Pricing*, 89 Harv. L. Rev. 901 (1976) 24

Schmalensee, *On the Use of Economic Models in Antitrust: the Realemon Case*, 127 U. Pa. L. Rev. 994 (1979) 24

Sullivan, *Antitrust* §§ 39, 43 (1977) 16

Sullivan, *Antitrust Microeconomics and Politics: Reflections on Some Recent Relationships*, 68 Cal. L. Rev. 1 (1980) 21

MISCELLANEOUS PAGE

Sullivan, *Economics and More Humanistic Disciplines: What Are The Sources of Wisdom For Antitrust?*, 125 U. Pa. L. Rev. 1214 (1977) 20, 21, 24, 26

Sullivan and Wiley, *Recent Antitrust Developments: Defining the Scope of Exemptions, Expanding Coverage, and Refining the Rule of Reason*, 27 UCLA L. Rev. 265 (1979) 24

Turner, *Antitrust Policy and the Cellophane Case*, 70 Harv. L. Rev. 281 (1956) 14

Williamson, *Commentary, Williamson on Predatory Pricing II*, 88 Yale L.J. 1183 (1979) 24

Williamson, *Predatory Pricing A Strategic and Welfare Analysis*, 87 Yale L.J. 284 (1977) 24

Yamey, *Predatory Price Cutting: Notes and Comments*, 15 Jour. of Law and Econ. (1972) 24

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is officially reported at 636 F.2d 1188. The opinions of the District Court for the Northern District of California are reported in 448 F. Supp. 228 and 458 F. Supp. 423. Copies are in the Appendix (filed separately); references to the opinions will be cited to the Appendix.

JURISDICTION

Although the judgment of the Court of Appeals was entered November 18, 1980, Memorex filed a timely petition for rehearing and suggestion for rehearing *en banc* which was denied on February 5, 1981. This petition for Writ of Certiorari was filed within ninety (90) days of the denial of the petition for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Sherman Act, Section 2 (15 U.S.C. § 2):

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .

Clayton Act, Section 4 (15 U.S.C. § 15):

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

A. Industry and Market Background.

This case involves the computer industry and IBM's response to new competitive entry into markets which until that entry had been IBM's private terrain. The relevant time period extends back to the early 1960s, but is primarily 1970-1973.

A general purpose computer system of the type marketed by IBM and a few other companies is composed of physical components called hardware and programmed instructions called software. The primary unit of hardware is the central processing unit ("CPU"), sometimes referred to as the mainframe. (12 RT 1840)[2] The remaining hardware consists of

[2] References to the reporter's transcript will be "RT" preceded by the volume number and followed by the page number. Memorex exhibits will be identified by the abbreviation "PX" followed by the exhibit number.

peripheral products which attach to the mainframe, including storage devices (disc drives and tape drives), control devices and input-output devices (printers and card readers). (PX 10649)

This case involves disc drives and control units and other peripheral products that are "plug compatible" with IBM CPUs at interfaces established by IBM. "Plug compatible" meant that the device could be attached to and used with the IBM system without significant adjustment. The plug compatible manufacturers or "PCMs" generally limited their products to those plug compatible with IBM CPUs because IBM was the only company with a sufficient number of installed CPUs to justify the expense involved in designing, manufacturing and marketing compatible products. These products, which were lower priced and equal to or better than those offered by IBM, thus represented an alternative to users who otherwise would have been required to take all components of the system from IBM.

B. Parties Involved.

Memorex is a California corporation with its principal office located in Santa Clara, California. It is a supplier of computer equipment, including control units and disc drives, and certain computer supplies such as computer tape and disc packs. Although Memorex supplied primarily peripheral equipment, during the relevant time period it also undertook the initial steps in a plan to become a full-scale participant in the general purpose computer systems market by manufacturing its own system. (PX 3964)

IBM, a New York corporation headquartered in Armonk, New York, is one of the world's wealthiest and most powerful corporations. It is by far the dominant worldwide supplier of computer equipment.

In 1969, the year prior to meaningful entry into the IBM peripherals markets by the PCMs, IBM had revenues in excess of $7 billion, net income before taxes of almost $2 billion, and cash equivalents of $1.6 billion. (PXs 10659-10661) In stark

contrast, in the same year Memorex's revenues, net income before taxes and cash equivalents were, respectively, 1%, 1.1% and ¼ of 1% of those of IBM. (PX 3964)

Historically, IBM has been preoccupied with maintaining its monopoly position and market power, a monopoly that dates back to the time when IBM had more than 90% of the tabulating machine market. As succinctly stated in 1964 by Thomas J. Watson, Jr., IBM's then Chairman of the Board and Chief Executive Officer:

> I think the main aim of this company must be to *protect and expand our position in the market place* and this must be a consideration well above that of profit.
>
> (PX 11759, p. 2) [emphasis added]

Since IBM computed its own share of the market at well over 75% at the time of these remarks (PXs 6662, p. 1; 6663, p. 28), "protecting and expanding" its market position was but a euphemism for the "willful maintenance of monopoly power." Six years later, as the PCMs were entering the peripherals markets, IBM accepted "the premise that legal defense is more desirable than major losses in the marketplace" and decided that acts should be taken to indicate to the PCMs "and the financial community that IBM could and would protect its market share." (PXs 2626, p. 2; 3131 pp. 2-3)

This then is not a case between companies competing on a reasonably equal footing. It is instead a case about attempted entry into markets created and dominated by IBM. IBM designed and controlled the interfaces required for attachment to each system. IBM determined the pace of new product introduction and had an "exclusive" on each product until it was first delivered and the required interface could be known to competitors. IBM selected and then maintained short term lease or rental as the basic method of marketing computer equipment. While such control over products and marketing practices constituted a formidable barrier to entry, the greatest barrier, clearly recognized as such by IBM, was the lease

market itself which placed the "greatest financial strain on competing equipment manufacturers." (PX 3141) Since revenues would be received not at the point of sale but in installments over a number of years, even successful entry would entail several years of negative cash flow and thus substantial needs for capital.

Despite the barriers to entry, the monopoly profits being earned by IBM on its huge lease base of peripheral products invited entry. As a result a number of PCMs risked entry into IBM terrain. This is the competitive process that the Sherman Act was designed to foster: new firms enter a market offering better products at lower prices and, if permitted to compete in an environment free from exclusionary acts by a dominant firm, bring consumers the benefits of choice, more innovation and competitive pricing.

IBM became preoccupied with the "threat" to its monopoly profits posed by entry of the PCMs and, having invited the entry, took action to derail it in its infancy. The course of conduct designed and used by IBM to exclude the PCMs is the subject matter of this lawsuit.

C. IBM Studied And Systematically Attacked Memorex And Other PCMs At The Point Of Entry With A Series Of Interrelated Acts Involving Predatory Pricing, Arbitrary Product Manipulations And Exclusionary Marketing Practices; All With The Intent And Effect Of Foreclosing Competition.

1. *IBM was unable to respond competitively with improved products, and instead acted to exclude the PCMs before they could surmount the barriers to entry.*

By the late 1960s Memorex had demonstrated that it could compete effectively with IBM in the computer tape market, a market characterized by sale and thus lacking the high barriers to entry created by the lease environment of the computer equipment markets. Encouraged by its success, Memorex began to offer lower-priced IBM plug compatible disc drives

which IBM recognized were superior to IBM's own disc drives. (PX 8682) Other PCMs did likewise. In the face of this new entry into "its" markets, IBM embarked upon a course of conduct deliberately intended to block entry and thereby foreclose any meaningful competition by the PCMs.

Prior to this entry IBM maintained its prices for peripheral equipment at extremely high levels and thus earned monopoly profits despite large cost reductions occasioned by technological advances. For example, a report to IBM's president in 1971 acknowledged that the prices of memory products (peripheral devices for which competition was just emerging) had remained unchanged for 16 years despite a "precipitous drop in costs." (PX 4004, p.7)

IBM's monopoly power also gave it control over the timing of introduction of new technology. IBM introduced new products at a controlled pace in order not to impact the steady stream of revenues from its huge lease base of older equipment. Faced with entry by the PCMs in 1970, IBM realized that it could not compete with them on a technological basis because "[i]n previous years when we had little effective plug compatible competition it was possible . . . to achieve quite long product lives and attractive profitabilities . . . by stretching out the rate of new product introduction. Owing to the change [emergence of competition], this is no longer possible, . . . [and] we have some problems in reorienting to a competitive situation." (PX 5484, p. 10) Unable to respond competitively, but aware that it controlled many of the barriers to entry, IBM acted to render the plug compatible markets virtually impenetrable.

2. *As an integral part of its exclusionary course of conduct IBM identified its target competitors and studied them in detail.*

IBM studied the PCMs continuously and in depth, not to gain background information about the new competitors and their products, but principally to ascertain their weaknesses so that an attack could be launched to stop the PCMs before they

could effectively enter the markets. IBM's early studies showed the PCMs to be well managed with good products and sound marketing and service organizations. (e.g., PXs 3148; 11064) These early studies also identified the principal area of vulnerability—the PCMs would need substantial financing until their lease bases were of sufficient size so that current product shipments could be financed by continuing revenues from shipments in prior years. (PXs 170; 2699) IBM recognized that it would require six years for the PCMs to achieve that size and turn cash flow from negative to positive. (PX 3034, p. 2)

Many of IBM's studies centered on Memorex, identified by IBM as the leading PCM in the disc drive and controller market. They were not studies by IBM of how to improve its own operations or effect cost savings which could be passed on to customers. The studies, primarily financial "impact" studies of how proposed IBM actions would affect Memorex, were instead literally war games by a dominant firm targeting its fledgling competitors. (PXs 435; 5138; 3024)

The IBM studies of Memorex were relied upon by top management of IBM in the formulation of actions taken against the PCMs. (PX 11084) A former IBM employee testified that the studies were "used to determine the various impacts IBM actions might have on their [the PCMs] viability" and that as a result of IBM acts Memorex "no longer was a break-even proposition under the impact case" and "was a very risky proposition and it was going to be touch and go whether [Memorex] survived." (20 RT 3380, 3401-A, 3503)

One key study calculated the impact on Memorex's cash flow over a six year period of a proposed IBM price cut. (PX 3024) The impact of the proposed price cut was that Memorex's peak cash needs would increase by a staggering $100 million. One month later IBM announced a price cut at the same level analyzed in the study. The study concluded that the effect on Memorex of the IBM price action would be "2314 [a

disc drive] program losses, double cash deficits and reduced financing capability" (i.e. by one act IBM caused Memorex to have greater cash needs and yet a reduced ability to meet those needs from either internal or external sources). (PX 3024, p. 5) IBM was right. As a direct result of the IBM price cut, Memorex saw its orders drop by 50% and was forced to cut back production by 30%.

3. ***IBM acted quickly and intentionally to foreclose new competition at the point of entry.***

In early 1970, when the PCMs as a group had less than 5% of the peripherals markets, IBM formed a "Key Corporate Strategic Issue" task force to study the PCMs and develop a strategy to contain the new entry. A long range strategy was developed which included most of the acts which were to unfold in a carefully orchestrated course of conduct over the ensuing 2-3 years. IBM's own analysis of this conduct showed that there would be adverse impact on IBM customers and on IBM itself as a result of the acts. The primary effect, however, would be the adverse impact on the PCMs. (PX 10294) In the long run only IBM would benefit from the successful exclusion of competition.

Memorex introduced extensive evidence to detail the entire course of IBM's conduct, including hundreds of IBM business records, testimony of key IBM officials, and expert testimony in regard to markets, pricing activities, product changes, and damages. In total some 87 witnesses testified, with more than 19,000 pages of testimony and 3,200 exhibits.

The acts that made up IBM's course of conduct can only be summarized here. In general terms, the course of conduct consisted of the following acts:

— pricing below IBM's average total or fully allocated costs on certain products.

— "limit" pricing designed to force the PCMs below their cost of production.[3]

— selective, discriminatory price cuts designed to force all PCM prices drastically lower while limiting the impact on IBM.

— manipulation of designs and interfaces so as to foreclose certain markets to the PCMs by creating technological incompatibilities which prevented the PCMs from attaching to IBM mainframes and tied the IBM peripherals to the mainframe.[4]

— concealment of IBM interface information needed to design compatible products.

— adoption of lease plans for the purpose of locking-in customers to IBM systems and foreclosing the PCMs from certain product markets before they could commence manufacture of competing products.

— misleading and premature product announcements designed to "freeze" the market while customers waited for the announced IBM product.

— tying a media product to an IBM disc drive to foreclose competition.

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[3] In the spring of 1971 IBM was "dusting off [its] Memorex data" to once again test the assumption that the "[PCM] floor for the [control unit] and drive should be $900/$300." (PX 3202, p. 2)

[4] The Court of Appeals for the Second Circuit noted "[t]he possibility lurking in *Memorex* that IBM, by creating technological incompatibilities, was tying peripherals sales to its CPUs . . . ." *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 283 (2d Cir. 1979); cert. denied, 444 U.S. 1093 (1980). With respect to one of the interface manipulations involved in this case, IBM acknowledged that "it was decided to add the control board to a 3-drive 2313 unit, thereby make it mandatory that the first 3 drives attached to the CPU are IBM's." (PX 401, p. 7)

Throughout the entire course of conduct, IBM continued its studies of Memorex and other PCMs in order to monitor the effect of its acts and to plan new attacks if the prior acts did not have sufficient impact. One study used input from an IBM designed computer model of Memorex, a model that permitted IBM "to identify what the critical variables are in [Memorex's] financial structure. . . ." (19 RT 3288)

IBM also developed a sophisticated computer model termed "STRIPIM" (Strategic IBM PCM Impact Model) to study PCM competitors. (PXs 10238; 10240; 10241) Use of STRIPIM permitted IBM to calculate what IBM called both precisely and vividly the "death level—price at which PCMs can no longer discount." (PX 6932, p. 9) If the PCMs could not discount below IBM's prices, they simply could not market their products. Death or bankruptcy would be imminent.

4. The effect of the course of conduct was virtual elimination of the PCMs.

The ultimate aim of IBM was to cripple the PCMs in the area where they were most vulnerable—the need for outside financing to offset the negative cash flows incurred while attempting to surmount the leasing barrier. IBM's success was nearly complete. Outside capital, which had been readily available to the new competitors in 1969 and 1970, was less available in the early 1970s. By 1974, the year IBM had predicted that Memorex's cash needs would peak, capital was completely unavailable.[5] (PX 10656) IBM had successfully told the financial community that IBM "could and would protect its market share." (PX 3131, pp. 2-3)

The impact on Memorex was staggering, ending its ability to generate cash either internally or externally. Total damages as a result of the IBM acts amounted to $333,000,000. Memorex was forced to abandon its limited entry into the general

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[5] IBM well understood that its acts were blocking entry, not only in the *Memorex* markets but in potential future markets as well:

> With the financing of printer and memory competition still in the future, we [IBM] feel fewer companies will enter this market than the tape/disc area. (PX 170, p. 2)

purpose systems market and wrote off almost $100,000,000. It avoided bankruptcy only through a complex debt restructuring agreed to by its major lenders.

The impact on the entire industry was even more devastating. Competition was eliminated by eliminating competitors. Of the 11 or 12 significant PCMs which entered in the late 1960s and early 1970s, only two or three remained viable by the time of trial. (PXs 11007; 11185; 48 RT 9880) The competitive effect was that IBM's acts deprived customers of the substantial benefits originally brought by the PCMs—freedom of choice, more innovation and lower prices.

D. Proceedings Below.

1. *Petitioner's complaint.*

In December, 1973 Memorex filed its complaints against IBM in two private antitrust actions brought pursuant to Section 4 of the Clayton Act. The complaints alleged that IBM had violated Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act. Prior to trial the two actions were consolidated and the Section 1 count was abandoned. After extensive pretrial proceedings, the case was remanded to the Northern District of California for trial before Judge Samuel Conti.

2. *Proceedings in the District Court.*

Trial by jury commenced on January 16, 1978. At the conclusion of some 51 days of plaintiff's evidence, IBM filed several motions for directed verdicts, all of which were denied except IBM's motion on the tie-in claim which was granted.[6] Trial continued for 32 more days.

On July 5, 1978, after 19 days of deliberation, the jury advised it was deadlocked 9 to 2 in favor of Memorex. Judge Conti declared a mistrial. On August 11, 1978, he granted a

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[6] *ILC Peripherals Leasing Corp. v. IBM*, 448 F. Supp. 228 (N.D. Cal. 1978).

directed verdict in favor of IBM as to all issues and entered a final judgment in favor of IBM, stating that Memorex did not present substantial evidence on any element of its Section 2 claim. Judge Conti also held that in the event of a remand for retrial Memorex's demand for a jury trial was stricken and any retrial would be by the court.[7] Judge Conti's opinion is completely contrary to the standard for ruling on directed verdict motions. He weighed conflicting evidence, adopted inferences most favorable to IBM and totally disregarded substantial portions of Memorex's evidence, in particular with respect to IBM's intent.[8] In addition, Judge Conti compartmentalized the various IBM acts and judged each in isolation. Contrary to authority going back to Justice Holmes' opinion in *Swift*,[9] this approach disregarded voluminous evidence that the acts were interrelated as part of a plan to "protect and expand [IBM's] position in the market place." (PX 11759, p. 2)

3. *Proceedings in the Ninth Circuit.*

Memorex filed its Notice of Appeal as to all issues on September 8, 1978. Prior to completion of briefing, the Ninth Circuit issued its opinion in *California Computer Products, Inc. v. International Business Machines Corp.*, 613 F.2d 727 (9th Cir. 1979) (hereinafter *"CalComp"*). In *CalComp* the Ninth Circuit affirmed a directed verdict in favor of IBM in a case brought against IBM by CalComp, another PCM. Although the Ninth Circuit in *CalComp* purported to establish a rule of reason standard for assessing the legality of conduct by a monopolist (App., pp. A-85-86), it in fact established a standard of *per se* legality for price reductions above marginal cost,

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[7] App., pp. A-56-66.

[8] *See, e.g.*, App., pp. A-24-25, 26-27, 29, 30, 35-36, 38, 44-45, 46, 50, 52, 54-56.

[9] *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905). *See also Continental Ore v. Union Carbide*, 370 U.S. 690, 699 (1962).

regardless of the defendant's intent. (App., pp. A-99-100) The rule adopted was initially articulated in Areeda and Turner, *Predatory Pricing and Related Practices under Section 2 of the Sherman Act,* 88 Harv. L. Rev. 697 (1975). It was thereafter adopted in two earlier decisions of the Ninth Circuit.[10] *CalComp* was settled and thus no Petition for Certiorari was filed.

On November 18, 1980, a panel of the Ninth Circuit issued a three-paragraph *per curiam* opinion in this case which affirmed the district court solely on the authority of *CalComp.* (App., p. A-2) Because *Memorex* rests exclusively on the *CalComp* holding, this petition, of necessity, is directed to the legal errors in the *CalComp* opinion.

REASONS FOR GRANTING THE WRIT

A. The Decisions Below And *CalComp* Are In Direct Conflict With Decisions Of This Court, Are Contrary To The Goals Of The Sherman Act, And Cannot Be Supported On The Claimed Goal of Economic Efficiency.

Since the Court of Appeals in *CalComp* assumed the possession of monopoly power by IBM, we will assume for purposes of this petition that IBM possessed monopoly power in the relevant markets. Our focus will be on the conduct element of monopolization.

1. *The Courts below totally ignored the "willful" standard of monopolization established in leading cases of this Court.*

The concept of monopolization under Section 2 has been considered by this Court in relatively few cases, most of them

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[10] *Hanson v. Shell Oil Co.,* 541 F.2d 1352 (9th Cir. 1976), *cert. denied,* 429 U.S. 1074 (1977), and *Janich Bros., Inc. v. American Distilling Co.,* 570 F.2d 848 (9th Cir. 1977), *cert. denied,* 439 U.S. 829 (1978).

involving monopolization by conspiracy or combination.[11] Unilateral monopolization has been considered in only a handful of cases.[12] None of these cases has included "predatory" conduct as an essential element of monopolization or even hinted at the use of mechanistic *per se* tests for judging the conduct of a monopolist.

Only two decisions have considered in depth the type of conduct that amounts to unlawful monopolization. One was *United Shoe*. The other and the landmark decision on this subject is Judge Learned Hand's opinion in *United States v. Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1946) *("Alcoa")*. Because this Court could not obtain a quorum eligible to sit in *Alcoa*, Judge Hand decided it under a special grant of jurisdiction and was acting in the capacity of a court of last resort. In *American Tobacco Co. v. United States*, 328 U.S. 781 (1946), this Court endorsed certain key elements of the *Alcoa* decision. (328 U.S. at 811-14)

Most commentators read *Alcoa* as holding that monopolization is a status offense.[13] However, even a more liberal reading, to the effect that monopolists are held to a stricter code of behavior than non-monopolists and must refrain from taking

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[11] *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *United States v. American Tobacco Co.*, 221 U.S. 106 (1911); *United States v. Terminal Railroad Association of St. Louis*, 224 U.S. 383 (1912); *United States v. Reading Co.*, 253 U.S. 26 (1920); *United States v. U.S. Steel Corporation*, 241 U.S. 417 (1920); *United States v. International Harvester Co.*, 274 U.S. 693 (1927); *United States v. Crescent Amusement Co.*, 323 U.S. 173 (1944); *United States v. U.S. Gypsum Co.*, 333 U.S. 364 (1948); *United States v. Griffith*, 334 U.S. 100 (1948); *International Boxing Club of New York, Inc. v. United States*, 358 U.S. 242 (1959).

[12] *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956) (the *Cellophane* case); *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965); *United States v. Grinnell Corporation*, 384 U.S. 563 (1966) *("Grinnell")*; *United States v. Otter Tail Power Co.*, 410 U.S. 366 (1973); and *United States v. United Shoe Machinery Co.*, 347 U.S. 521 (1954), a *per curiam* affirmance without opinion of the decision in 110 F. Supp. 295 (D. Mass. 1953) *("United Shoe")*.

[13] *See* Turner, *Antitrust Policy and the Cellophane Case*, 70 Harv. L. Rev. 281 (1956).

action intended to destroy competition, would condemn IBM here. *Alcoa* teaches that any act done with the purpose of maintaining or enhancing monopoly power is unlawful monopolization. The result is not dependent upon a finding, or even consideration, of whether the acts in question promoted economic efficiency or met some mechanistic test.

Judge Wyzanski reached the same conclusion in *United Shoe*. He found that United Shoe had monopolized because its monopoly was "not attributable solely to defendant's ability, economies of scale, research, natural advantages and adaption to inevitable economic laws" but instead to "other barriers to competition, and those barriers were erected by United's own business policies." (110 F. Supp. at 343, 344)

This is precisely what occurred here. IBM's pricing, leasing practices, interface concealment and product manipulations were its "own business policies" specifically designed to erect "barriers to competition." Neither *Alcoa* nor *United Shoe* is even cited in *CalComp*. But if *Alcoa* and *United Shoe* are the law or set forth any vital element of it, then the *CalComp/Memorex* decisions are in direct conflict with them and are clearly wrong.

2. *The* CalComp/Memorex *decisions totally disregard evidence of defendant's intent and are thus in direct conflict with a number of decisions of this Court stressing the importance of intent in assessing antitrust violations.*

Memorex introduced literally dozens of IBM documents together with related testimony clearly demonstrating IBM's anticompetitive intent in undertaking the various pricing, marketing and product actions in issue. These business records do not evidence a "careless word once spoken in a board room"[14] or a clumsy choice of words to describe innocent behavior. They show that the course of conduct engaged in by IBM was

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[14] *Transamerica Computer Co., Inc. v. International Business Machines Corp.*, 481 F. Supp. 965, 990 (N.D. Cal. 1979).

aimed directly at Memorex and the other PCMs and was developed and monitored at all levels of IBM's management, including top officials and a so-called "Blue Ribbon Task Force." The words used in many of these records are more appropriate to war games than to corporate strategy and vividly displayed IBM's grand design—e.g. the IBM acts would make each PCM "a dying company"; price reductions were made to the "death level" of PCM competitors; the "Memorex 2314 [disc drive] will not recover full cost at low [impact] price"; the "SMASH" announcement would "wipe out" an entire PCM product line; certain product manipulations were characterized to IBM's Chairman of the Board by an IBM official as "gimmicky tactics"; and one IBM product with a changed interface was referred to within IBM as a "kludge" (a computer system made up of poorly matched components).[15] These are only a few examples of the vast amount of evidence which demonstrated IBM's intent to crush the new competition.

The trial judge in *Memorex* did not even mention the overwhelming evidence of anticompetitive intent. Nor did the Ninth Circuit. Like evidence was also ignored in *CalComp*. The reason for this complete neglect is presumably because the *per se* pricing rules do not even include intent as a part of the equation.

This neglect, however, is in direct conflict with numerous pronouncements of this Court emphasizing the importance of intent in antitrust cases.[16] In *Grinnell* this Court in discussing the "willful" acquisition or maintenance standard stated:

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[15] PXs 2919, p. 4; 6932, p. 9; 11225; 5318, p. 15; 2179, p. 12; 763, p. 1; 2915, p. 2.

[16] *See, e.g., United States v. United States Gypsum Co.*, 438 U.S. 422, 440-41 (1978); *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 696-97, n.12, 702-03, n.14 (1967); *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 552 (1960); *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 372 (1933); *Poller v. Columbia Broadcasting*, 368 U.S. 464, 473 (1962); *see generally* Sullivan, *Antitrust* §§ 39, 43 (1977).

> We shall see that this second ingredient presents no major problem here, as what was done in building the empire was done plainly and explicitly for a single purpose. 384 U.S. at 571

Recently, several lower courts have taken the position that deep price cuts are nothing more than tough competition encouraged by the Sherman Act. In *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 658 (1967), however, this Court had the following to say about such price cuts when accompanied by exclusionary intent:

> It might be argued that the respondents' conduct displayed only fierce competitive instincts. Actual intent to injure another competitor does not, however, fall into that category . . . . 386 U.S. at 702-3, n.14.

The *National Commission for the Review of Antitrust Laws and Procedures* rejected the marginal cost rule for a broader inquiry because the rule excluded a number of relevant factors, including intent:

> Conversely, where there is other evidence of exclusionary or predatory intent, the fact that prices were above marginal cost should not absolutely bar a finding of liability. Rather, the relation of price to marginal cost should be considered in its context along with the separate evidence of intent and the defendant's market power. *For example, where a firm with a dominant market position undertakes a pattern of pricing behavior directed at excluding new entrants from a market in circumstances in which the firm could expect such efforts to be successful, liability may be found even if the prices charged were above marginal cost.* Such pricing behavior directed at existing competitors by a dominant firm in a market with high entry barriers, for example, should be reachable under Section 2. Report, pp. 149-50, GPO ed. (1979) (emphasis added).

In short, exclusionary intent is axiomatic to Section 2, whether it be the general intent required for monopolization or the "specific intent" needed to show attempt. Direct evidence

of intent may often be difficult to discover; in such cases conduct can be examined in order to infer the requisite intent. What the decisions below and other recent cases in lower courts have lost sight of, however, is that when direct evidence of the requisite intent in fact exists, it is highly relevant. Even Professors Areeda and Turner, who started the search for mechanistic tests six years ago, conclude in their recent treatise that "*clear* direct evidence of disciplinary intent" can bring price cuts to levels above marginal cost within the proscriptions of Section 2.[17] [emphasis in original]

3. *The* CalComp/Memorex *decisions sacrifice intent and the willfulness test to mechanistic* per se *pricing rules.*

Although *CalComp* purports to state a rule of reason test for determining the legality of the conduct of a monopolist (App., pp. A-85-86), it actually holds that when price cuts are involved a *per se* standard comes into play which resolves, as a matter of law, whether the conduct is reasonable. (App., pp. A-99-100) If the price cuts are found by the court to be "profitable," they become *per se* lawful without consideration of any other factors. Although the *per se* rule so far has been used by the Ninth Circuit and other courts solely to affirm dismissals of Section 2 claims, presumably the converse would also be true; i.e., if the price cuts are below average variable or marginal cost, they are *per se* unlawful.[18]

A holding that rejects any consideration of factors other than a specific measure of profitability in assessing price cuts is in conflict with clear pronouncements of this Court. For example, in *Schine Chain Theatres v. United States,* 334 U.S. 110 (1948) this Court stated:

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[17] Areeda and Turner, *Antitrust Law* (1978) ¶ 715, n.7.

[18] Areeda and Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act,* 88 Harv. L. Rev. 697, 712-13 (1975); see also Areeda & Turner, *Antitrust Law* (1978) ¶ 715.

> [P]rice cutting without more is not a violation of the Sherman Act. It is indeed a competitive practice which this record shows to have been common in the industry. It may be used in violation of the Act. Thus it may be the instrument of monopoly power to eliminate competitors or to bring them to their knees. But since it is not unlawful *per se,* facts and circumstances must be adduced to show that it was in purpose or effect employed as an instrument of monopoly power. 334 U.S. at 120-21

The *CalComp/Memorex per se* rules are also in direct conflict with several recent pronouncements of this Court establishing that the rule of reason rather than a *per se* rule is the norm for antitrust enforcement.[19] This Court has endorsed a few *per se* rules of illegality. But there has never been a rule of *per se* legality.

Even where *per se* rules have been adopted, this Court has moved with considerable caution, and recently stated that a *per se* rule is inappropriate "until after considerable experience with the type of challenged restraint." *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.,* 441 U.S. 1, 19 n.33 (1979); *id.* at 9-10. No Court has any meaningful experience with the various mechanistic *per se* tests for pricing which have been proposed. Moreover, the limited experience has been conflicting and inconsistent. A *per se* rule of legality is thus particularly inappropriate for monopoly pricing.

Indeed, not until lower courts began embracing Areeda and Turner's marginal cost rule approximately five years ago did anyone surmise that sales below cost might be a condition precedent to recovery under Section 2. Sales below cost constitute conduct supporting an inference of the requisite

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[19] *See, e.g., Continental TV, Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36 (1977); *National Society of Professional Engineers v. United States,* 435 U.S. 679 (1978).

general or specific intent to monopolize, but to make that evidence a *sine qua non* to recovery regardless of other proof of intent is to stand Section 2 on its 91 year old head.

The recent preoccupation with cost-based and similar tests for pricing behavior may result from *attempt* cases such as *Hanson* and *Janich*[20] in the Ninth Circuit. These cases, representative of others in recent years, involved nothing more than price cuts. There was no other evidence of intent to exclude. The courts thus were being urged to infer specific intent to monopolize solely from a reduction in price. Price cuts, and for that matter design changes, though potential means for predation, are also the very life blood of competition. In a case such as *Hanson,* courts must be wary of labeling competitive pricing unlawful without independent evidence of exclusionary intent. But when a record is replete, as here, with explicit evidence of a subjective intent to exclude, an intent confirmed at the highest managerial levels, replacing the rule of reason with a *per se* test of legality is totally inappropriate.

4. *The cost-based* per se *rules of* CalComp/Memorex *sacrifice the broader goals of the Sherman Act for purported economic efficiency.*

The mechanistic tests of *CalComp/Memorex* are said to be appropriate regardless of the impact on competitors because "only less efficient firms will be disadvantaged. . . ." (App., p. A-100)[21] Under such a view of the antitrust laws it is apparently of no consequence that competitors may be deliberately driven from the market because "the Sherman Act is meant to protect the competitive process, not competitors."

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[20] Note 10, *supra.*

[21] Sullivan, *Economics and More Humanistic Disciplines: What Are The Sources of Wisdom For Antitrust?,* 125 U. Pa. L. Rev. 1214, 1214-16 (1977).

(App., p. A-98). Such statements and the holdings they induce fly in the face of pronouncements from this Court emphasizing that the goals of the antitrust laws are far broader than static notions of economic efficiency. The very case that is the source of the "competition not competitors" statement makes this point clear. As stated by this Court in *Brown Shoe Co. v. United States,* 370 U.S. 294 (1962):

> It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision. 370 U.S. at 344 [22]

A number of other authorities render it clear that the purpose of the antitrust laws encompasses not merely economic standards of efficiency with all spoils awarded to the "winner," but broad populist goals of dispersion of power.[23] These goals

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[22] This same view was stated succinctly by Judge Hand in the *Alcoa* decision:

> [Congress in passing the Sherman Act] was not necessarily actuated by economic motives alone. It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his skill and character, to one in which the great mass of those engaged must accept the direction of few.
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> * * *
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> Throughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost an organization of industry in small units which can effectively compete with each other. 148 F.2d at 427-29

[23] *United States v. Von's Grocery Co.,* 384 U.S. 270, 274 (1966); *Standard Oil Co. v. United States,* 221 U.S. 1, 50, 76 (1911); *United States v. TransMissouri Freight Assn.,* 166 U.S. 290, 323 (1897); *American Tobacco Co. v. U.S.,* 328 U.S. 781, 813 (1946); A.D. Neale, *The Antitrust Laws of the U.S.A.,* pp. 427-32 (Cambridge University Press 1970); Sullivan, *Economics and More Humanistic Disciplines: What Are The Sources of Wisdom for Antitrust,* 125 U. Pa. L. Rev. 1214, 1219-20 (1977); Sullivan, *Antitrust Microeconomics and Politics: Reflections on Some Recent Relationships,* 68 Cal. L. Rev. 1 (1980).

are totally inconsistent with *per se* rules of legality based upon static economic models of pricing practices. The choice was made and the goals were established in 1890. Congress has not seen fit to change them.

5. *The* per se *tests adopted by* CalComp/Memorex *cannot be supported on grounds of efficiency and result in virtual immunity for a monopolist.*

CalComp justified the *per se* rule of marginal cost on grounds of economic efficiency because "only less efficient firms will be disadvantaged. . . ." (App., p. A-100) This is simply not true. In fact, the most pernicious aspects of the cost-based rules are their reliance on static economic analysis and their singular focus on the short run. Real world markets, in particular those involved here, are often complex and characterized by barriers to entry which are ignored in the type of analysis which led to the marginal cost rule.

As pointed out by the commentators, if a monopolist can reduce its prices to some point above its marginal cost to repel a new entrant, it can deliberately and successfully preclude entry even by equally or more efficient firms in the long run. A new entrant often must discount below the prices of the established firm, at least until some degree of market recognition is attained. In addition, the entrant requires considerable time to increase its output to a level that affords the economies of scale available to the dominant firm. Strategic use of price reductions above marginal cost but below the entrant's survival level can thus force the new firm out of the market before it achieves market recognition and economies of scale.[24] In addition, an otherwise well-qualified but new firm suffers the disavantage of an inexperienced work force and the perception by would-be investors that it is a high risk venture. Again, any cost-based rule would permit a monopolist to exclude such firms prior to the time they overcome these entry problems.[25]

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[24] Williamson, *infra,* note 26 at 289-90, 296; Scherer, *supra,* note 26 at 870-75.

[25] Williamson, *infra,* note 26 at 302-4.

The only consistent strain in the vast amount of economic and legal literature which has dealt with the issue raised in Areeda and Turner's first article in 1975 has been that their marginal cost rule fits only very limited circumstances which are not applicable in *CalComp* or *Memorex*. The literature proposes so many different cost-based, output restriction, profit maximization and other so-called efficiency-related tests that only one truth is evident—our leading economists and antitrust scholars are not even close to agreement on what test will even allegedly promote efficiency in either the short or long run.[26]

In a vain search for precision, objectivity and efficiency those adopting cost-based rules have used simplistic, short-run, static theory to solve complex, long-run, strategic problems. Indeed, a cost-based rule invites a dominant firm to strike early while an entrant faces a short-run cost disadvantage and the need to discount and before entry barriers can be overcome.

Not only is such a cost-based rule deficient under sound economic theory, it is not workable for evaluating predatory pricing for numerous practical reasons. As knowledgeable

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[26] Areeda and Turner, *Williamson On Predatory Pricing*, 87 Yale L.J. 1337 (1978); Areeda and Turner, *Predatory Pricing: A Rejoinder*, 88 Yale L.J. 1641 (1979); Areeda and Turner, *Scherer on Predatory Pricing: A Reply*, 89 Harv. L. Rev. 891 (1976); Bartkus, *Innovation Competition: Beyond Telex v. IBM*, Note, 28 Stan. L. Rev. 285 (1976); Baumol, *Quasi Permanence of Price Reductions: A Policy for Prevention of Predatory Pricing*, 89 Yale L.J. 1 (1979); Beckenstein and Gable, *Predation Rules: An Economic and Behavioral Analysis*, The Colgate Darden Graduate School of Business Administration, University of Virginia, December 1979; Brock, *Price and Product Actions—Partial Systems*, The U.S. Computer Industry, a Study of Market Power, p. 109, Ballinger Publishing Company; *Commentary, An Appraisal of Marginal Cost and Predatory Pricing Under Section 2 of the Sherman Act*, 30 Ala. L. Rev. 562 (1979); Elzinga, *Predatory Pricing: The Case of the Gunpowder Trust*, 13 Jour. Law and Econ. 223 (1970); Greer, *A Critique of Areeda and Turner's Standard for Predatory Practices*, 24 Antitrust Bull. 233 (Summer 1979); Joskow and Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 Yale L.J. 213 (1979); Jordan, *Telex v. IBM: Remodeling the Crisis in Antitrust*, Note, 23 UCLA L. Rev. 737 (1976);

(Footnote continued on following page)

commentators have pointed out, cost estimation poses very serious difficulties. Professor Williamson states that a marginal cost test would be a "defendant's paradise"[27] because of the uncertainties in estimating costs. Professor Bork notes that true average variable costs (Areeda and Turner's surrogate for marginal cost) cannot be reconstructed adequately from business records in a firm of any complexity.[28] As IBM itself admitted in *Greyhound Computer Corporation, Inc. v. IBM,* 559 F.2d 488 (9th Cir. 1977), in a lease market "future rental income and future expenses are unknown and highly speculative." 559 F.2d at 506

(Footnote continued from previous page)
Koller, *When is Pricing Predatory?,* 24 Antitrust Bull. 283 (Summer 1979); Koller, *On the Definition of Predatory Pricing,* 20 Antitrust Bull. 329 (Summer 1975); Koller, *The Myth of Predatory Pricing: An Empirical Study,* 4 Antitrust Law and Econ. Rev. 105; McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case,* 1 Jour. Law and Econ. 137 (1958); Posner, *Antitrust Law: An Economic Perspective,* University of Chicago Press (1976); Posner, *The Chicago School of Antitrust Analysis,* 127 U. Pa. L. Rev. 925 (1979); Potter, *Pacific Engineering & Production Co. v. Kerr-McGee Corp.—Predatory Pricing Under Section 2 of the Sherman Act,* Note, 2 Utah L. Rev. 377 (1977); Salop, *Strategic Entry Deterrence,* American Economic Association (May 1979); Scherer, *Predatory Pricing and the Sherman Act: A Comment,* 89 Harv. L. Rev. 868 (1976); Scherer, *Some Last Words on Predatory Pricing,* 89 Harv. L. Rev. 901 (1976); Scherer, Book Review, *The Posnerian Harvest: Separating Wheat from Chaff,* 86 Yale L.J. 974 (1977); Schmalensee, *On the Use of Economic Models in Antitrust: The Realemon Case,* 127 U. Pa. L. Rev. 994 (1979); Sullivan and Wiley, *Recent Antitrust Developments: Defining the Scope of Exemptions, Expanding Coverage, and Refining the Rule of Reason,* 27 UCLA L. Rev. 265 (1979); Sullivan, *Economics and More Humanistic Disciplines: What are the Sources of Wisdom for Antitrust?* 125 U. Pa. L. Rev. 1214 (1977); Williamson, *Predatory Pricing: A Strategic and Welfare Analysis,* 87 Yale L.J. 284 (1977); Williamson, *Commentary, Williamson on Predatory Pricing II,* 88 Yale L.J. 1183 (1979); Note, *Telex v. IBM, Monopoly Pricing Under Section 2 of the Sherman Act,* 84 Yale L.J. 558 (1975); Yamey, *Predatory Price Cutting: Notes and Comments,* 15 Jour. of Law and Econ. (1972).

[27] Williamson, *supra,* note 26 at 305 and 1196.

[28] Bork, *The Antitrust Paradox,* 154 (1978).

Indeed, there is no meaningful way to determine costs of a particular product of a large multi-product manufacturer where numerous cost allocations must be made, many of them on the basis of revenue. In addition, each element of cost and revenue in a profitability analysis is solely an estimate or a prediction. As such, they are subject to manipulation by the litigation-minded monopolist which, absent other evidence of intent to exclude, will be virtually impossible to second-guess years later in a court of law.

IBM clearly recognized that all of these estimates were under its control. In a presentation to top management of how price increases might be justified to the government under the 1971 price controls, it was stated "depending on the [cost] variables utilized . . . prices could vary as much as –20% to +15%. . . ." (PX 10120, p. 4) Application of the Areeda and Turner *per se* rule thus provides a company such as IBM with absolute judicial immunity for a course of conduct by which it systematically eliminated competition. IBM can justify its acts by predicting its success at excluding competition.

Judges and juries attempting to apply cost-based tests are thus faced not only with theoretical confusion as to what objective norms should be used to test pricing policies, but also with almost impossible empirical problems in identifying marginal, variable and average total costs. The great virtue of direct evidence of intent, when it is available, is that, given the strengths and limitations of judicial institutions, it provides a far more reliable guide to socially dangerous conduct than does any available objective test. As indicated by Professor Sullivan:

> If we are going to rely on judges and jurors to discover predatory practices perhaps their inquiry cannot be limited to price-cost relationships or focused exclusively on efficiency as a value. The traditional legal rule . . . speaks in terms of intent and identifies the predatory firm as one trying to inhibit others in ways independent of the predator's own ability to perform effectively in the mar-

> ket. . . . A price reduction or expenditure is predatory . . . when it is designed to impose losses on other firms in order to exclude them. The traditional rule, . . . instead of seeking objective indicia of competitive injury solely in the price-cost relationship . . . gives credit to the common insight that a purpose to avoid competition by disposing of competitors is likely to lead to competitive injury.

Sullivan, *Economics and More Humanistic Disciplines: What Are the Sources of Wisdom for Antitrust,* 125 U. Pa. L. Rev. 1214, 1229 (1977).

6. *The practical effect of the cost-based rules has been to deprive plaintiffs of their right to jury trial.*

IBM maintained in the *CalComp* and *Memorex* proceedings that the legality of its conduct should not be decided by a civil jury because, in IBM's view, the case was too complex to understand. This position is directly contrary to a number of statements by this Court stressing the importance of the civil jury.[29] The "complex case" argument was recently rejected by the Ninth Circuit in *In Re U.S. Financial Securities Litigation,* 609 F.2d 411 (9th Cir. 1979).

The practical effect, however, of the application of the *per se* pricing rules to real world situations has been to deprive plaintiffs of their right to jury trial. Both *CalComp* and *Memorex* involved directed verdicts granted by the trial court and affirmed by the Ninth Circuit. As shown in the following section, the same result has taken place in a number of other circuits. The major degree of "certainty" introduced by the *per se* pricing rules is that, for the reasons discussed above, defendants in monopolization cases invariably will prevail without having their conduct assessed by a jury.

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[29] *Jacob v. City of New York,* 315 U.S. 752, 762 (1942); *Dimick v. Schiedt,* 293 U.S. 474, 486 (1935); *City of Morgantown, W. VA. v. Royal Ins. Co.,* 337 U.S. 254, 258 (1949).

B. There Is Conflict Between The Circuits As To The Proper Test for Monopolization.

There is a conflict between the Circuits and the Federal Trade Commission regarding the proper test for unlawful conduct of a monopolist when the conduct involves price reductions. There is like conflict when the price reductions are viewed in the context of an attempt to monopolize rather than monopolization.

The *per se* marginal cost rule (or a close variation thereof) has been adopted in the Fifth Circuit,[30] Ninth Circuit[31] and Tenth Circuit.[32] In the Third Circuit, a lower court adopted the rule.[33]

The *per se* marginal cost rule has been specifically rejected by the Seventh Circuit[34] and the Federal Trade Commission.[35]

There are no circuit court decisions in the Second and Sixth Circuits, but lower courts have rejected the test.[36]

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[30] *International Air Industries v. American Excelsior Co.*, 517 F.2d 714, 722-25 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976).

[31] *Memorex; CalComp; Hanson v. Shell Oil Co.*, 541 F.2d 1352 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977); *Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978); *but see Transamerica Computer Co., Inc. v. International Business Machines Corp.*, 481 F. Supp. 965, 988-96 (N.D. Cal. 1979) (appeal pending).

[32] *Pacific Engineering & Production Co. of Nevada v. Kerr-McGee Corp.*, 551 F.2d 790, 795-97 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977); *see also Telex Corp. v. IBM Corp.*, 510 F.2d 894, 925-26 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975).

[33] *Weber v. Wynne*, 431 F. Supp. 1048 (D.N.J. 1977); *but see O. Hornusel Co. v. Ferro Corp.*, 472 F. Supp. 793, 795-96 (W.D. Pa. 1979).

[34] *Chillicothe Sand & Gravel Co. v. Martin Marietta Corp.*, 615 F.2d 427, 432 (7th Cir. 1980).

[35] *Borden, Inc.* (1976-1979 Transfer Binder) Trade Reg. Rep. (CCH) ¶ 21490 (1979); see also *I. E. du Pont Nemours & Co.*, 3 CCH Trade Reg. Rep. ¶ 21, 770, pp. 21970-983 (1980).

[36] *Northeastern Tel. Co. v. American Tel. & Tel. Co.*, 497 F. Supp. 230, 240-41 (D. Conn. 1980); *Richter Concrete Corp. v. Hilltop Basic Resources, Inc.*, 1981-1 Trade Cas. ¶ 63,947 (S.D. Ohio 1981).

C. This Court Should Act Now To Settle An Important And Timely Issue Of Federal Law With Far-Reaching Consequences.

It has been over 35 years since Judge Hand decided *Alcoa*. As developed above, since that time this Court has considered the standard of conduct for a monopolist in a very few cases, with no case approaching the in-depth analytical review of the conduct issue by Judge Hand. The result has been confusion and conflict in the courts, the Federal Trade Commission, and the private bar, with extensive and conflicting legal and economic commentary on the issue of the appropriate rules for judging the legality of price reductions.

An immense amount of judicial time, and public and private resources, have been consumed in trying cases with results that have in many instances led to summary dispositions after lengthy trials when the standards were different from what they were when trial commenced. For example, the *Transamerica* case[37] consumed months of trial time. The day before the jury was to be instructed the *CalComp* decision came down causing the court to modify certain key jury instructions.

An articulation by this Court of the appropriate standards could eliminate, and will certainly diminish, the uncertainties involved in trying these cases, and would lead to more certain decisions by the trier of fact. A knowledge of the standards should deter the bringing of questionable cases and lead to better enforcement of the antitrust laws.

Extremely important cases presently pending in lower federal courts could well be affected by this Court's establishment of a clear standard for monopolization. In particular, the massive government cases against IBM and American

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[37] *Transamerica Computer Co., Inc. v. International Business Machines Corp.*, 481 F. Supp. 965 (N.D. Cal. 1979).

Telephone and Telegraph Company would undoubtedly benefit from a clear articulation of the appropriate standards for judging the conduct of a monopolist.

Given the number of recent cases on the issues presented by this petition, many of them decided on a summary basis, firms with substantial market power may feel justified in concluding that they can lower prices to any level above cost even if they intend to eliminate new rivals which have not yet achieved optimum efficiency or overcome other barriers to entry. Such was the scenario in *CalComp* and *Memorex*. Such may well be the scenario in other markets and industries. And victims, by definition bankrupt or crippled, may not be able to finance proceedings as Memorex has done at a cost of millions of dollars. Accordingly, whether this Court wishes to reject or reaffirm its prior teachings under Section 2, the time is indeed now.

CONCLUSION

We respectfully submit that a Writ of Certiorari should issue and that the decision of the court below should be reversed with directions to remand the case for trial using the appropriate standard for monopolization under Section 2 of the Sherman Act.

Dated: May 6, 1981.

JOHN L. ENDICOTT
PAUL G. BOWER
515 South Flower Street
Los Angeles, California 90071
Attorneys for Petitioners

Of Counsel:

GIBSON, DUNN & CRUTCHER
RONALD S. BEARD
2029 Century Park East
Los Angeles, California 90067

LIMBACH, LIMBACH & SUTTON
KARL A. LIMBACH
2001 Ferry Building
San Francisco, California 94111